

CERTIFIED COPY

NEWPORT BEACH CITY COUNCIL MEETING

NEWPORT BEACH RECOVERY, LLC, APPEAL

NEWPORT BEACH, CALIFORNIA

TUESDAY, APRIL 14, 2009



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7 Newport Beach City Council hearing was taken on
8 behalf of the City of Newport Beach at 3300 Newport
9 Boulevard, Newport Beach, California, beginning at 7:25
10 p.m., and ending at 7:45 p.m., on Tuesday, April 14,
11 2009, before LAURA A. MILLSAP, RPR, Certified Shorthand
12 Reporter No. 9266.
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1 APPEARANCES:

2
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10 CITY OF NEWPORT BEACH
11 BY: EDWARD SELICH, Mayor
12 MICHAEL F. HENN, Council Member
13 STEVEN ROSANSKY, Council Member
14 KEITH CURRY, Council Member
15 DON WEBB, Council Member
16 NANCY GARDNER, Council Member
17 LESLIE DAIGLE, Council Member
18 DAVID HUNT, City Attorney
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25 For Newport Beach Recovery, LLC:

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LAWYER'S NOTES

[illegible]

1 NEWPORT BEACH, CALIFORNIA; TUESDAY, APRIL 14, 2009

2 7:25 P.M. - 7:45 P.M.

3
4 MR. SELICH: Okay. We have a public hearing
5 scheduled for a time certain. It's 7:15, or the next
6 item afterwards. So we're going to move on to item
7 number 20, which is the first public hearing under our
8 public hearing agenda. This is a hearing that was set
9 for a time certain, 7:15. It's the appeal of the Hearing
10 Officer's denial of use permit for 1216 West Balboa
11 Boulevard, Newport Coast Recovery.

12 And I'll turn it over to staff for staff
13 presentation.

14 MR. HUNT: Thank you, Mr. Mayor.

15 David Hunt, City Attorney, will be making the
16 initial presentation, along with Jim Markman, Special
17 Counsel that's assisted us with respect to the Ordinance
18 in this matter.

19 We are here for your second appeal with respect
20 to use permit hearing regarding the group homes. This is
21 the Newport Coast Recovery appeal. This matter was
22 decided by the Hearing Officer who denied the permit.

23 The appeals come forward to you. It's the same
24 standard we talked about when we talked about the Ocean
25 Recovery appeal. This is not a de novo hearing. It's a

1 hearing dealing with what's called substantial evidence.

2 The job for the Council in hearing an appeal
3 such as this is to review the record and make a
4 determination whether there's substantial evidence that
5 supports the finding of the Hearing Officer.

6 That's based entirely on the record. So I
7 would ask that Council would focus on that, and I would
8 ask the public and those who testify to focus on the
9 issue of whether or not there was actually evidence
10 before the Hearing Officer that supported this decision.

11 There were two issues that were raised as
12 preliminary matters with respect to this -- this appeal.
13 One was that we had a request for a stay of this
14 proceeding, pending a reasonable accommodation request,
15 on behalf of the Appellant.

16 I received an e-mail from Appellant's Counsel
17 withdrawing that request. So there's no longer a request
18 for a stay as it was highlighted in my memo to you.

19 The second issue that's before you that is a
20 preliminary issue is what to do with evidence that's
21 acquired after the close of the hearing.

22 Now, if you recall, I mentioned that this is a
23 substantial evidence appeal standard, which means you
24 look at the record of what was before the Hearing
25 Officer. So normally, issues that come up after the

1 Hearing Officer's made his decision are not admissible
2 and cannot be considered by the Council in making the
3 determination on the appeal.

4 If, however, evidence comes forward that could
5 not have been reasonably represented during the hearing,
6 and if it is relevant to the issues to be determined by
7 the Hearing Officer, the Council has the option to remand
8 that evidence to the Hearing Officer for consideration.

9 Such evidence, however, cannot be used in
10 determining at this level whether the Hearing Officer's
11 action was supported by substantial evidence or not. So
12 that's sounds like a bunch of legal gobbledygook, I'm
13 sure. Let me try to make it simple.

14 If you think the evidence that's later acquired
15 is relevant and could not have been reasonably submitted
16 at the time of the hearing, and you feel the Hearing
17 Officer should consider it, your option is to remand it
18 to the Hearing Officer for consideration.

19 You cannot, however, use it in a determination
20 of this appeal, even if you make those findings. So if
21 you make those findings, it has to go back to the Hearing
22 Officer if you wish for it to be considered.

23 That having been said, you have an Appellant
24 before you, the Newport Coast Recovery. We also have a
25 staff presentation that can be made after that. It's my

1 recommendation that you allow the Appellant to address
2 the Council on the issues, provide the Appellant 10
3 minutes, provide staff with 10 minutes to address those
4 issues, then open the public hearing and allow for
5 testimony from the audience. Then when we close, we'll
6 come back and address the preliminary issue, and then
7 ultimately, if you get to it, the substantial evidence
8 issues.

9 If you do decide to remand to the Hearing
10 Officer based upon the latter acquired evidence, you will
11 not need to reach the substantial evidence issue. That
12 would not be before you. It would go back to the Hearing
13 Officer for consideration.

14 So with that introduction, I'd like to suggest
15 requesting the Appellant come forward to address the
16 issue.

17 MR. SELICH: Okay. Should we not allow him the
18 option to rebut the public testimony also?

19 MR. HUNT: Absolutely, Mr. Mayor. My
20 apologies. My suggestion is to allow for 10 minutes for
21 Appellant, and then for staff, public testimony, and then
22 allow staff and Appellant. Appellant should have the
23 close and do 3 minutes at the end. The Appellant has the
24 burden of proof. So my apologies.

25 MR. SELICH: Okay. With the Council's

1 indulgence, then, I will allow the public 3 minutes to
2 comment during the public comment area. So it would be 3
3 minutes for each public member to comment during the
4 public comment period.

5 So I'll ask the Appellant's representative to
6 step forward please. State your name for the record,
7 please.

8 MR. BRANKHART: Good evening. My name is Chris
9 Brankhart. I represent the Appellant, Newport Coast
10 Recovery. Thank you, Mr. Mayor and Members.

11 As was outlined by staff, this is an appeal on
12 the Appellant record that was compiled by the Hearing
13 Officer. The Appellant standard set forth in 20.91A.040.

14 What we ask here today is that Council vacate
15 the Hearing Officer's Resolution 2009-001, and recommend
16 to staff that the use permit be granted, and that it be
17 granted in accordance with staff's recommendation, and
18 that staff originally proposed to the Hearing Officer,
19 that is, that the facility be operated with a 14-bed
20 limit.

21 The Applicant, Newport Coast Recovery, is and
22 remains willing to live within that recommendation that
23 was presented by staff but unfortunately rejected by the
24 Hearing Officer.

25 What is not at issue here tonight is the

1 so-called after-acquired evidence. And it's not at issue
2 here, because it's not part of the record that was before
3 the Hearing Officer. But I would say more importantly
4 than that, it's not at issue, nor would any purpose be
5 served by remanding this to the Hearing Officer.

6 Because essentially, what you've been presented
7 with in the after-acquired evidence is a question about
8 licensure. And there is only one entity that is
9 competent to go ahead and conduct an investigation and
10 make that determination, and that is the licensing
11 agency. That's not something that can be done by the
12 Hearing Officer.

13 What is at issue is whether or not there's
14 substantial evidence in the record to support a
15 finding -- the two adverse findings that were reached by
16 the Hearing Officer. The Appellant claims there is not.
17 And I think if you take a look at the Resolution that was
18 drafted by the Hearing Officer, you'll concur.

19 Those two findings are, first, that the
20 operation of this facility has a detrimental impact on
21 the adjacent neighborhood. The basis of that is its
22 proximity to three types of facilities, the school 300
23 feet away, a child care 750 feet away, and a quarter mile
24 away, two ABC licensed facilities, Fry's Market and the
25 American Legion.

1 What is fascinating about the Hearing Officer's
2 decision is that nowhere is there any evidence to
3 establish why it is that these proximate distances are
4 relevant at all to a determination of an adverse impact
5 upon the community.

6 In fact, nowhere in the decision is there any
7 evidence, competent evidence, that's presented as to what
8 adverse impact there would be upon the community because
9 of the proximity to these facilities, the school, the day
10 care, and the ABC licensed facilities.

11 If you would, members, if you turn to the
12 determination that was issued, which is what we're here
13 to review tonight, it's page 10 of the Hearing Officer's
14 determination. And this is where he states -- this is
15 where he states the basis of the finding of adverse
16 impact upon the neighborhood.

17 He says "These facilities" -- referring to the
18 school and the day care, "These facilities," quote,
19 "could -- could be affected by the use due to residents
20 of Newport Coast Recovery using the open recreational
21 area associated with the elementary school, and the
22 potential for residents at Newport Coast Recovery to
23 loiter, smoke and engage in offensive and disruptive
24 behavior incompatible with the nearby school and day
25 care."

1 Members, that language is not substantial
2 evidence. That is nothing more than speculation as to
3 what could happen. And it's the worse type of
4 speculation that goes to the core of the problem that
5 we're going -- we're confronting here with this
6 Ordinance. It's speculation that's based upon
7 discriminatory stereotypes; that is, that individuals in
8 recovery, to quote the decision, loiter, smoke and engage
9 in offensive and disruptive behavior.

10 The staff has presented a staff report to you
11 complied by Mr. Kiff and his staff members. They
12 identify a number of -- or I should say a handful of
13 anecdotal exerts of testimony that was provided to the
14 Hearing Officer in which individuals complain about some
15 conduct at Newport Coast Recovery.

16 Now, I do not want to minimize those complaints
17 at all. One individual complains that on two occasions,
18 there were vans there were blocking the back alleyway.
19 He also complained that someone put trash into his trash
20 can. Another individual complains about the noise and
21 noising music. Another person complains that she can
22 smell smoke when she walks by the location.

23 Each one of these is a significant quality of
24 life infraction that means a lot to these individuals.
25 None of them, however, constitutes substantial evidence

1 that justified a denial of housing.

2 What they do justify, when an individual
3 confronts an infraction -- quality of life infraction, is
4 calling the police. Because what we have right now is
5 this system in which individuals come before the Council
6 or Hearing Officer months after a quality of life
7 infraction has occurred and make allegations, untested,
8 that we will never get to the bottom of.

9 If, indeed, these allegations are occurring,
10 these infractions of quality of life, which are important
11 to individuals, the proper course of action is to contact
12 the police who can ascertain at the time is there a
13 problem and what is the source of the problem?

14 I want to turn your attention to the last, I
15 think the most pernicious, finding by the Hearing
16 Officer. And that's this claim of overconcentration
17 based upon one sole fact.

18 The Hearing Officer determines that there's an
19 overconcentration of care facilities, residential care
20 facilities, because Newport Coast Recovery happens to be
21 300 feet from Balboa Horizons. Now, there is no finding
22 whatsoever other than that simple fact, 300 feet
23 distance, that it would cause any adverse impact upon the
24 community.

25 More importantly, when you draft it in past

1 your Ordinance in 2008-05, one of the purposes stated by
2 the Council, the stated purpose, was to benefit the
3 disabled, to avoid the appearance or the creation of
4 institutionalized neighborhoods. None of those findings
5 are made by the Hearing Officer.

6 In addition, of course, the Applicant has
7 challenged and will challenge the legality of the
8 Ordinance as applied in effect and on its face. But I
9 want to conclude here tonight with this.

10 The standard of review is substantial evidence.
11 What you have here in the record that's been presented to
12 you by the Hearing Officer is speculation base upon
13 discriminatory stereotypes. There is no substantial
14 evidence to support these particular findings.

15 The anecdotal evidence that's provided, these
16 are significant issues that impact individuals' lives.
17 But the solution is, at the time they are occurring, to
18 contact the police, and let's get to the bottom of what
19 is the problem and what is the source of the problem.

20 What I would ask, then, is that you not remand
21 this for further proceeding to a Hearing Officer, who's
22 not the competent person to make the determination based
23 upon the after-acquired evidence you have.

24 What I ask is that you vacate the Hearing
25 Officer's determination, and direct staff to create a new

1 Resolution, a Resolution that's modeled after staff's own
2 original recommendation of the 14-bed limit, bring it
3 back and approve it.

4 I want to thank you very much for your time.
5 Thank you, Members.

6 MR. SELICH: Thank you. Now we'll have the
7 staff give their presentation.

8 MR. KIFF: Thank you, Mr. Mayor and Council
9 Members.

10 I'm Dave Kiff, Assistant City Manager, along
11 with Janet Brown. We served as the City's staff in this
12 public hearing on Newport Coast Recovery. I did provide
13 a fairly detailed staff report that has been available to
14 the public and for your review.

15 I just want to summarize the conclusion that
16 staff made in the memo, and that was that the Hearing
17 Officer did act based on substantial evidence in the
18 record. And that was what we were asked to analyze as a
19 part of this document coming to you in the appeal.

20 And we did affirmatively find, based on
21 knowledge of that hearing and the record, that he acted
22 based on substantial evidence. I don't have any further
23 report to add except that

24 MR. SELICH: Okay. Does any other staff member
25 going to make any other presentation, or is that it?

1 Kit?

2 MR. BOBKO: If I get there, okay.

3 I will not reiterate -- Kit Bobko, Special
4 Counsel for the City.

5 I'm not going to retread the path that Mr. Kiff
6 has already passed for us now, but I will make two quick
7 points.

8 The first one is simply to question my learned
9 Counsel's description of the evidence in the record as
10 anecdotal, and I'll point you to two different things.

11 The first one is is that one of the neighbors
12 who has a home directly adjacent to this business -- and
13 make no mistake, this is a business -- complained about
14 some expansion that had occurred, and he was worried
15 about it being a fire hazard.

16 Now, as you all know, the separation between
17 your homes on the Peninsula and in the City is many times
18 a matter of feet, if at all. And this guy came in here
19 and he said, "I know there was a fire there. The wiring
20 there was substandard. There were no permits pulled.
21 Basically, it was a job that was done in the cover of
22 darkness, and they are endangering me and my family." I
23 don't think that's anecdotal at all.

24 There was another situation where one of the
25 neighbors came in and he said, "Listen, I have tenants.

1 I can't keep a tenant." Why? It's not because of some
2 anecdotal thing, no. It's a very specific thing. And
3 it's the problems that I have with the Applicant. Is
4 that anecdotal? That guy didn't seem to think so. The
5 money he was losing from his tenants not being there
6 certainly isn't anecdotal.

7 So the City is -- as Counsel for the staff, we
8 question very strongly whether anecdotal is, in fact,
9 correct. And it isn't. It just isn't. Too many
10 neighbors came in here with specific evidence about this
11 particular Applicant to call it anecdotal.

12 With regard to the second issue, whether or not
13 to consider newly acquired evidence, it's the City's
14 position or staff's position that if there was newly
15 acquired evidence from the Applicant, it would be proper
16 to remand it to the Hearing Officer. It just so happens
17 in this case that the newly acquired evidence is City
18 evidence that we came by during the course of our regular
19 City business.

20 Now, having said that, as Counsel for the
21 staff, I have to argue very strenuously that you should
22 not consider that evidence. That is not before you
23 tonight.

24 I agree with opposing Counsel. What you should
25 do tonight is simply remand it to the Hearing Officer, so

1 that everybody gets a chance to argue about what is or
2 isn't evidence, whether this is something that should be
3 considered at all.

4 But at least at first blush, this is definitely
5 evidence that weighs and bears upon this issue, and that
6 we believe, as staff, should be in front of the Hearing
7 Officer because it is germane. It is very germane to the
8 issues in this case.

9 MS. DAIGLE: What is your response to his
10 comment that the Hearing Officer is not the right person
11 to hear this?

12 MR. BOBKO: We disagree. This is -- the
13 administrative procedure that we've set up is this. It
14 has been very meticulously crafted so that the Hearing
15 Officer is independent. And again, you need look no
16 further for evidence of the Hearing Officer's
17 independence than, again, from what my opposing Counsel
18 said.

19 He said he wants you to do what staff
20 recommended. I'm Counsel for staff. The Hearing Officer
21 did something completely different. He's making his own
22 decisions. The way that we've set this administrative
23 procedure up in this City is that he's the guy who gets a
24 first crack at that.

25 And the fairest way for this to proceed is for

1 opposing Counsel to have an opportunity to look through
2 the police reports, to look through whatever other
3 evidence that there is, to present whatever story that
4 they have about what happened or didn't happen to the
5 independent Hearing Officer for him to render an opinion.
6 That is not for you all tonight, in my opinion.

7 So, those are the two things. First of all, we
8 don't believe that this is anecdotal. If you do decide
9 to go forward with this decision, we believe there is
10 substantial evidence in the record.

11 Secondly, but more importantly, we would ask
12 you to remand this to the Hearing Officer so that he
13 could look at this evidence in the first instance.

14 MR. SELICH: What is your response to his claim
15 that the Hearing Officer is inappropriate because it's a
16 licensing issue?

17 MR. BOBKO: Again, we disagree. The issue here
18 is a land use issue. And the Hearing Officer is the one
19 that we have set up to make these land use
20 determinations. I think your City Attorney, my colleague,
21 will probably answer it in more detail. But we believe
22 it is a land use issue. This may have something to do
23 with licensing, but that's a separate argument entirely.

24 MR. SELICH: Any other questions?

25 MR. BOBKO: Thank you.

1 MR. SELICH: Thank you.

2 Okay. Does that conclude the staff
3 presentation, then?

4 MR. KIFF: Yes, sir.

5 MR. SELICH: Okay. At this point, I'll open it
6 up to public comment on this side. Again, remember,
7 public comments is limited to 3 minutes, and there's a
8 little box on the podium that has green, yellow and red
9 lights. And when the yellow light comes on, you 1 minute
10 left. If anyone wants to speak on this side, come
11 forward please.

12 MR. SELICH: Okay. Seeing no one -- stand up
13 at one time here.

14 MR. NICHOLS: Dick Nichols.

15 MR. SELICH: Three minutes, Dick.

16 MR. NICHOLS: Thank you.

17 This is an operation that is definitely an
18 integral operation. It's -- due to size alone, you're
19 asking to -- even the allowance, when you cut it down,
20 goes to only 14 beds.

21 This is in the residential neighborhood. We've
22 said that these are -- just as we did the homes where you
23 have multiple people living in group homes, that this is
24 not an appropriate place for the residential. You fought
25 that in Court. You won. This should be not even a

1 question from now on.

2 The closeness to the school is very much,
3 again, a problem. It's something that they knew about.
4 They are not apparently addressing.

5 I believe that you have definitely an
6 overconcentration in that area. It's obvious that these
7 homes that are in that area are larger. You are talking
8 about 14, 20, 30 people in the homes. This is not 6 or
9 under. This is not that model of discrimination because
10 they are acting like a family. This is not in that at
11 all.

12 The facility is definitely in the residential
13 neighborhood, according to our zoning, and so forth, and
14 we need to enforce that. And I believe that that should
15 be satisfactory to oust this type of unit.

16 Thank you.

17 MR. SELICH: Thank you.

18 Next speaker?

19 MR. MATHENA: Hello. I'm Larry Mathena,
20 M-a-t-h-e-n-a.

21 Briefly, a couple of different points. There
22 very clearly is substantial evidence purely by weight in
23 this over 600-page evidentiary record. Very
24 specifically, even though perhaps -- and frankly, I do
25 agree with the Appellant that the Hearing Officer's

1 decision could have been far more artfully, far more
2 harshly, far more precisely written -- there's a huge
3 amount of data, much more than mere anecdotal to come to
4 the conclusions that the Hearing Officer did.

5 Specifically, there was video evidence of
6 problematic behavior at the facility. There was other
7 substantial problems. Over 40 petitioners from parents
8 at the school provided a petition expressing their
9 concerns. A former school administrator went into great
10 detail as to the problems about having this type of
11 facility so close to a school and the issues that it
12 raises.

13 Above and beyond that, on the overconcentration
14 issue, there is dramatic substantial overconcentration.
15 The Appellant's arguments focus in terms of a specifics
16 to the comparison to the location of Balboa Horizons.
17 And, in fact, in its specific claims raised the issue
18 that, "Oh, they were there first, and they shouldn't be
19 burdened by overconcentration."

20 The reality is, Balboa Horizons had a
21 substantial evidence in its record as to functioning as a
22 good operator with no community problems raised by all
23 the people around it, as opposed to this facility, which
24 had numerous, repeated, ongoing complaints.

25 A final point relative to licensure and issues

1 that it might raise, two different things. Whether or
2 not something's licensed is one point. Whether or not
3 that evidence and how was it acquired and presented and
4 should have potentially been presented by the Appellant
5 is another thing.

6 And depending on the circumstances of that,
7 whether or not one decides where licensure is, that in
8 and of itself would be a ground to deny use permit in and
9 of itself.

10 So in conclusion, your Hearing Officer made a
11 firm decision. He did so with a substantial evidentiary
12 record in support of his decision. I agree, personally,
13 that the decision could have been more artfully drafted.
14 But ultimately, the record exists to support the decision
15 to deny.

16 Thank you.

17 MR. SELICH: Thank you.

18 MS. FUNDENBERG: Good evening, Council. My
19 name is Louise Fundenberg, F-u-n-d-e-n-b-e-r-g. I'm a
20 President of Central Newport Beach Community Association.
21 We represent over 500 people in the area, and we have
22 felt very strongly that the Hearing Officer's decision
23 should be followed by the Council, and we hope that you
24 will deny the use permit to this organization.

25 Thank you.

1 MR. SELICH: Thank you.

2 Any other speakers on this subject?

3 MS. OBERMAN: Good evening. My name is Denys
4 Oberman.

5 I just wanted to make a couple of quick
6 clarifications, and I request that these items be entered
7 into the record, because perhaps they were not
8 articulated in the staff summary report to Council. And
9 for that reason, maybe the facts and testimony weren't as
10 full or robust and as compelling as, in fact, they were
11 based on the evidence and testimony presented.

12 First of all, there is current, actual
13 overconcentration in this area. The staff report
14 suggested it was potential for overconcentration in the
15 area. Specifically in the 11th and 12th Street blocks
16 alone -- and each of those blocks, by the way, factually,
17 as in the 300 to 330 feet, depending on who is
18 counting -- these are the facilities that are known exist
19 there.

20 1132 West Balboa, which is Balboa Horizons, is
21 an 11-bed facility. Use permit to that is approved.

22 1115 West Balboa Boulevard. It's an existing
23 22-bed facility, Ocean Recovery, with a pending use
24 permit.

25 1216 West Balboa. It's an existing facility of

1 29-beds, which is the Appellant -- subject Appellant
2 here. And the status, I guess, one would consider
3 pending.

4 1217 West Bay Avenue is stated or represented
5 to be a 6-bed facility, Ocean Recovery.

6 1129 West Balboa Boulevard, an existing 12-bed
7 facility, not state licensed, permit. And that facility,
8 I am pleased to report, appears to have been vacated. We
9 have heard reports that the people have relocated down
10 the Peninsula. But in any event, congratulations,
11 Council. It does appear that somebody acknowledged the
12 abatement.

13 In this listing that I just gave does not
14 include the 1601 West Balboa facility, which is also a
15 large facility, or a known facility on 9th Street.

16 So approval of the 1216 facility would
17 constitute three large facilities with a total of four
18 known facilities within 300 feet of one another based on
19 known facilities alone.

20 So there's nothing in the law that prevents the
21 City from mitigating for overconcentration. And our
22 understanding is that that is part of the land use
23 scheme, and that is not just relative to group
24 residential uses specifically, but generally, that
25 overconcentration is a land use concept that needs to be

1 attended to very carefully by a city.

2 Secondly, the report makes general reference to
3 the residents' complaints. There's been a comment on
4 this already. I just wanted to very briefly summarize
5 some of the things that we did not find specifically in
6 the staff report but which were documented in the
7 evidence that was made available to the Hearing Officer.

8 First, Applicant -- 30 seconds?

9 MR. SELICH: 30 seconds.

10 MS. OBERMAN: Thank you.

11 Applicant failed to apply for or obtain
12 previously required permits, CUP permits.

13 Applicant made business license registration as
14 a personal service rather than a residential care
15 business, even though it was clear that he knew his
16 business was such since he registered it with the ADP as
17 a residential care business.

18 Applicant did operate an illegal residential
19 care facility across the street at 1219 West Balboa for
20 several years, which the City is aware of and which the
21 Appellant has conceded he operated.

22 And the Applicants there received supervision
23 and treatment at 1216 West Balboa, which was closed at
24 some unspecified date, according to the Appellant.

25 So the Applicant continues to make excuses for

1 failure to comply with various City Codes and Ordinances,
2 and I believe there are others listed in the staff
3 report.

4 And I think the thing we need ask ourselves is,
5 is this an Applicant that is prepared to be judicious?
6 Has he demonstrated that he can, in fact, operate his
7 business?

8 And the business impacts neighbors not only
9 immediately around the residence, but also in the open
10 area, the playground, the school, the beach. And I can
11 personally attest to that, as can the other 83 people
12 that attended the use permit hearing, about a half of
13 whom gave testimony there.

14 Thank you.

15 MR. SELICH: Thank you. Any other speakers?

16 Okay. Is there anyone who wants to speak after
17 this lady? If you do, come down the aisle, please. We
18 have a long meeting tonight.

19 Go ahead, ma'am.

20 MS. ABRAHAM: I wasn't going speak, but -- my
21 name is Sarah Abraham. I live at 908 West Bay Avenue.

22 I was here a couple of weeks ago when the
23 facility at 9th and Balboa was approved, and that's
24 around the corner from my home. I understand that at
25 1217 West Bay Avenue, a facility will open soon.

1 The facility in question today backs up to 1217
2 West Bay in the alley. And I feel that that's an
3 overconcentration, plus two more in the 1100 block.

4 And as a -- someone who lives in the
5 neighborhood, I just feel it's too much, and would -- you
6 know, I know Denys. I know other people in here. And we
7 all feel it's too much, and if you would just consider
8 the citizens and the homeowners in the area, we'd
9 appreciate it.

10 Thank you.

11 MR. SELICH: Thank you.

12 MR. SOYLEMEZ: Mustafa Soylemez, 407 Bolsa.

13 I just want to make it known on the record that
14 I absolutely believe there's an
15 overconcentration -- actual demonstrated
16 overconcentration in the area.

17 Like Denise and some others have said, there
18 has been -- and it's come before this Council many times
19 or in the past, specifically, with different hearings,
20 and whatnot, for an attorney and Appellant attorney to
21 come before you and say there's not an overconcentration.
22 I just don't understand how that can be when there's
23 demonstrated factual evidence here.

24 Second of all, I don't appreciate -- and I
25 think I'd like to make this known to the Council -- I

1 don't appreciate it when, again, Appellant's
2 representatives or attorneys come before you and tell you
3 what is going on in the neighborhood. I think the burden
4 of proof falls on them to demonstrate that it's not going
5 on, as opposed to the neighbors that it is going on.

6 We have come before you on numerous occasions
7 with specific evidence. And I don't appreciate this
8 passive-aggressive behavior of saying, "Well, it is a
9 quality of life issue, but it's not really a quality of
10 life issue. So we're not going to -- we're going to
11 discount that, and we're not go to take that into fact."

12 You know, I'm affected by this issue very
13 seriously, and those are just my two points for the
14 record.

15 Thank you.

16 MR. SELICH: Thank you. Any other speakers?
17 Seeing none, I'll invite the Appellant to step forward.

18 Three minutes.

19 MR. BRANKHART: Thank you very much.

20 Mr. Mayor, Members, when we talk about the word
21 "overconcentration," what we're claiming is that there
22 are individuals who are disabled living in homes in
23 proximity to each other. And those are facts that are on
24 the ground.

25 But those don't constitute a finding that would

1 justify denying a permit. And the important point that
2 we've tried to make here tonight is that when you read
3 the Hearing Officer's decision, that evidence is not
4 there.

5 There's a second and more important point that
6 the Council will have to come to terms with soon, and
7 that is, who in the structure of authority is the
8 competent person to decide these various issues?

9 It is, for example, our claim tonight that the
10 Hearing Officer is not, nor could the Hearing Officer
11 ever be the competent person to decide the after-acquired
12 evidence. There's only one entity and agency that can do
13 that. The Hearing Officer can opine. The Hearing
14 Officer can look, but he cannot decide. And there's only
15 one competent entity that can gather the evidence and
16 apply the proper determination.

17 But the second, I think, more important thing,
18 because it impacts more directly on Council, is who is
19 the most competent person to decide when the quality of
20 life issues -- and I don't mean to minimize them passive
21 aggressively or otherwise -- when quality of life
22 infractions occur? It is not this Council or the Hearing
23 Officer two, three, five months later when people come
24 forward and say, "This happened outside my home."

25 If there is a genuine infraction on behalf of

1 Newport Coast Recovery, what we would like to see is that
2 the police be called and a determination be made if there
3 is, indeed, a problem. And if so, what is the source of
4 that problem?

5 We accept that responsibility as being a
6 responsible member of the community. But to have
7 individuals come forward and testify -- or not even
8 testify -- present these materials to you that we cannot
9 determine, whether it be wiring -- none of us will ever
10 know if there was a wiring problem when a dryer was put
11 in.

12 None of us will ever know whether the music was
13 too loud or perhaps it had poor lyrics. We ever never
14 get to the bottom of these things, because we are not the
15 people who are on the ground that can decide those facts.

16 Those are determinations that have to be made
17 by police officers, who can determine what the problem
18 is, what the source is. And that is a fundamental
19 problem with what's occurring, I think, in the process
20 here tonight.

21 At bottom, there is no substantial evidence to
22 support these particular findings that were made by the
23 Hearing Officer, nor would we benefit from a remand.

24 Accordingly, what I would ask is that we vacate
25 the Hearing Officer's determination, and we direct staff

1 to redraft one that could be entered in accordance with
2 the original staff recommendation.

3 I want to thank you very much for your
4 patience. Thank you. Good-bye.

5 MR. SELICH: Okay. With that, I'll close the
6 public hearing.

7 And staff, do we have any additional thoughts
8 you'd like to bring forward before the Council discusses
9 this?

10 MR. MARKMAN: I'd like to address the Council
11 briefly on the question of remand, which I'm going to
12 recommend to the Council, because my obligation and
13 function here is to be sure at the end of this process
14 that whatever decision is rendered by the Council is
15 legally valid and defensible.

16 And I think because of -- let me sort of recap
17 what happened. Last week, some evidence came into the
18 hands of the City staff. It's been shared with the
19 Council. It's been shared with Mr. Blankhard, the
20 Applicant. So everybody understands what that is. And
21 yet, you are now asked to go forward to make a decision
22 and erase that from your mind.

23 But I can assure you that if that happens, when
24 we get to court and this is reviewed, some bright lawyer
25 is going to say, contrary to what I'm arguing, that the

1 Council couldn't have erased that from the Council's mind
2 because of the nature of what it was.

3 And so I suggest that -- so that we have a
4 defensible process, that piece of evidence be presented
5 to the Hearing Officer in a remand, that the Applicant be
6 given an opportunity to explain that piece of evidence,
7 disagree with it, rebut it, or however they want to deal
8 with it, and that the Hearing Officer can judge it as
9 relevant or not relevant, as being titled great weight or
10 little weight, and decide whether to include mention of
11 it in a Resolution or not, and let it come back here on
12 that basis.

13 Then the fact that it was in your mind in the
14 first place doesn't matter anymore, because it's also in
15 the record. I just don't like to have a piece of
16 evidence that's out there in the public eye, in memos,
17 distributed to all sides, and then asked the Council to
18 move forward, disregard that -- I know you can disregard
19 that, but I also know that when we get to court, someone
20 will say you didn't disregard it.

21 And that's the reason why I'd ask you to adopt
22 a motion remanding this matter to the Hearing Officer for
23 the narrow purpose of considering that evidence, and any
24 response and rebuttal that is pertinent to it only, a
25 narrow remand.

1 MR. SELICH: Okay. Well, the staff
2 recommendation is to remand it to the Hearing Officer for
3 review of the after-acquired evidence only.

4 Discussion? Motion? Councilman Henn?

5 MR. HENN: I do have a motion, but I have a
6 question first of our attorneys.

7 It was my impression that we should be
8 considering the totality of the record before us, and
9 there seemed to be a suggestion by the Applicant's
10 attorney, or the Appellant's attorney, that we should
11 only consider what was stated in the Hearing Officer's
12 finding.

13 Am I correct that we should be considering the
14 entire record before us?

15 MR. HUNT: Yes. The issue is whether or not
16 you -- there's substantial evidence in the record before
17 you. That's the Appellate issue. That's not related to
18 the after-acquired evidence. It is what's the issue is
19 before you.

20 MR. MARKMAN: The record before you, I want to
21 make clear, is the record that is in the Hearing
22 Officer's transcript and what was presented to him.

23 The record before you is not what was said
24 tonight -- argument by Counsel's relevant but it's not
25 evidence -- nor anything you heard after the hearing was

1 closed. It's not evidence.

2 You're limited to the evidence that was
3 presented to the Hearing Officer. But all the evidence,
4 not just what he may have mentioned in his Resolution.

5 MR. HENN: So that's clear to me. It's also
6 clear to me that we should be observing due process here
7 on behalf of all the participants in this proceeding.

8 And so, in the interest of making sure that
9 that's the case, I'll move in accordance with special
10 Counsel's recommendation that this be remanded to the
11 Hearing Officer for consideration of the narrow issue of
12 the after-acquired evidence for him to make a decision.

13 MR. ROSANSKY: Second the motion.

14 MR. SELICH: Okay. Any further discussion?
15 Council Daigle?

16 MS. DAIGLE: No.

17 MR. SELICH: With that, please vote.

18 MS. BROWN: Motion carries.

19 MR. SELICH: Okay.

20 (Ending time: 8:05 p.m.)
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2
3 I, the undersigned, a Certified Shorthand
4 Reporter for the State of California, do hereby certify:

5 That prior foregoing proceedings were taken
6 before me at the time and place herein set forth; that
7 any witnesses in the foregoing proceedings, prior to
8 testifying, were placed under oath; that a verbatim
9 record of the proceedings was made by me using machine
10 shorthand which was thereafter transcribed under my
11 direction; further, that the foregoing is an accurate
12 transcription thereof.

13 I further certify that I am neither financially
14 interested in the action nor a relative or employee of
15 any attorney of any of the parties.

16 IN WITNESS WHEREOF, I have this date subscribed
17 my name.

18
19 Dated: APR 21 2009

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22 Laura A. Millsap, RPR
23 CSR No. 9266
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A	ADP 25:16	anymore	applied 13:8	10:21
abatement	adverse 9:15	32:14	apply 25:11	Association
24:12	10:4, 8, 15	apologies	29:16	22:20
ABC 9:24	12:23	7:20, 24	appreciate	assure 31:23
10:10	affirmat...	apparently	27:9, 24	attended
Abraham	14:20	20:4	28:1, 7	25:1 26:12
26:20, 21	after-ac...	appeal 1:8	appropriate	attention
absolutely	9:1, 7	4:9, 19, 21	19:24	12:14
7:19 27:14	13:23	4:25 5:2	approval	attest 26:11
accept 30:5	29:11 33:3	5:12, 23	24:16	attorney
accommod...	33:18	6:3, 20	approve 14:3	3:11, 17
5:14	34:12	8:11 14:19	approved	4:15 18:20
accurate	agency 9:11	appeals 4:23	23:21	27:20, 20
35:12	29:12	appear 24:11	26:23	33:10, 10
acknowledge...	agenda 4:8	appearance	April 1:10	35:16
24:11	aggressi...	13:3	2:10 4:1	attorneys
acquired	29:21	APPEARANCES	area 8:2	28:2 33:6
5:21 6:14	ago 26:22	3:1	10:21 20:6	audience 7:5
7:10 16:13	agree 16:24	appears 24:8	20:7 22:21	authority
16:15, 17	20:25	Appellant	23:13, 15	29:7
22:3	22:12	5:15 6:23	26:10 27:8	available
act 14:17	ahead 9:9	7:1, 2, 15	27:16	14:13 25:7
acted 14:21	26:19	7:21, 22, 22	argue 16:21	Avenue 3:5
acting 20:10	aisle 26:17	7:23 8:9	17:1	24:4 26:21
action 6:11	allegations	8:12, 13	arguing	26:25
12:11	12:7, 9	9:16 20:25	31:25	avoid 13:3
35:15	alley 27:2	22:4 24:1	argument	aware 25:20
actual 23:12	alleyway	24:1 25:21	18:23	
27:15	11:18	25:24	33:24	B
add 14:23	allow 7:1, 4	27:20	arguments	back 6:21
addition	7:17, 20, 22	28:17	21:15	7:6, 12
13:6	8:1	Appellant's	artfully	11:18 14:3
additional	allowance	5:16 8:5	21:1 22:13	32:11
31:7	19:19	21:15 28:1	articulated	backs 27:1
address 7:1	American	33:10	23:8	Balboa 4:10
7:3, 6, 15	9:25	Appellate	ascertain	12:21
31:10	amount 21:3	33:17	12:12	21:16, 20
addressing	analyze	Applicant	asked 14:18	23:20, 20
20:4	14:18	8:21 13:6	31:21	23:22, 25
adjacent	anecdotal	16:3, 11, 15	32:17	24:6, 14
9:21 15:12	11:13	25:8, 11, 13	asking 19:19	25:19, 23
administ...	13:15	25:18, 25	Assistant	26:23
17:13, 22	15:10, 23	26:5 31:20	3:12 14:10	base 13:12
administ...	16:2, 4, 6, 8	32:5	assisted	based 5:6
21:9	16:11 18:8	Applicants	4:17	7:10 11:6
admissible	21:3	25:22	Associate	12:17
6:1	Angeles 3:6	Applicant's	3:12	13:22
adopt 32:21	answer 18:21	33:9	associated	14:17, 20
				14:22

23:11	30:14,21	case 16:17	clearly	9:9 10:7
24:18	Boulevard	17:8 34:9	20:22	13:22 29:8
Basically	2:9 3:13	cause 12:23	Clerk 3:13	29:11,15
15:21	4:11 23:22	Central	close 5:21	29:19
basis 9:21	24:6	22:20	7:5,23	complain
10:15	box 19:8	certain 4:5	21:11 31:5	11:14
32:12	Brankhart	4:9	closed 25:23	complained
Bay 24:4	8:8,9	certainly	34:1	11:19
26:21,25	28:19	16:6	closeness	15:13
27:2	briefly	Certified	20:2	complains
beach 1:7,8	20:21 25:4	2:11 35:4	Coast 4:11	11:17,20
1:9 2:7,8	31:11	certify 35:5	4:21 6:24	11:21
2:9 3:3,7	bright 31:24	35:14	8:9,21	complaints
3:14,15	bring 14:2	challenge	10:20,22	11:16
4:1 22:20	31:8	13:7	11:15	21:24 25:3
26:10	Brown 3:12	challenged	12:20	completely
bears 17:5	3:13 14:11	13:7	14:12 30:1	17:21
beds 19:20	34:18	chance 17:1	Codes 26:1	complied
beginning	bunch 6:12	child 9:23	colleague	8:12 11:11
2:9	burden 7:24	Chris 8:8	18:20	comply 26:1
behalf 2:8	28:3	circumst...	come 4:23	conceded
5:15 29:25	burdened	22:6	5:25 7:6	25:21
34:7	21:19	citizens	7:15 12:5	concept
behavior	business	27:8	19:10 21:3	24:25
10:24 11:9	15:12,13	city 1:7 2:7	26:17	concerns
21:6 28:8	16:19	2:8 3:3,7	27:18,21	21:9
believe 17:6	25:13,15	3:11,12	28:2,6	conclude
18:8,9,21	25:16,17	4:15 14:10	29:6,23	13:9 19:2
20:5,14	26:7,8	15:4,17	30:7 32:11	conclusion
26:2 27:14		16:7,17,19	comes 6:4	14:15
benefit 13:2	C	17:23	19:9	22:10
30:23	CA 3:6,14	18:20	coming 14:19	conclusions
beyond 21:13	California	24:21 25:1	comment 8:2	21:4
Blankhard	1:9 2:9	25:20 26:1	8:2,3,4	concur 9:18
31:19	4:1 35:5	31:18	17:10 19:6	conduct 9:9
block 27:3	call 16:11	City's 14:11	25:3	11:15
blocking	called 5:1	16:13	comments	confronting
11:18	30:2	claim 12:16	19:7	11:5
blocks 23:15	calling 12:4	18:14 29:9	community	confronts
23:16	care 9:23	claiming	10:5,8	12:3
blush 17:4	10:10,18	28:21	12:24	congratu...
Bobko 3:5	10:25	claims 9:16	21:22	24:10
15:2,3	12:19,19	21:17	22:20 30:6	consider
17:12	25:14,17	clarific...	comparison	6:17 16:13
18:17,25	25:19	23:6	21:16	16:22 24:2
Bolsa 27:12	carefully	clear 25:15	compelling	27:7 33:11
bottom 12:8	25:1	33:21 34:5	23:10	consider...
13:18	carries	34:6	competent	6:8,18
	34:18			

7:13 34:11 considered 6:2,22 17:3 considering 32:23 33:8 33:13 constitute 24:17 28:25 constitutes 11:25 contact 12:11 13:18 continues 25:25 contrary 31:25 core 11:4 corner 26:24 correct 16:9 33:13 Council 1:7 2:7 3:8,9 3:9,10,10 3:11 5:2,7 6:2,7 7:2 8:14 12:5 13:2 14:8 22:18,23 23:8 24:11 27:18,25 29:6,18,22 31:8,10,12 31:14,19 32:1,17 34:15 Councilman 33:4 Council's 7:25 32:1 Counsel 4:17 5:16 15:4 16:7,20,24 17:17,20 18:1 Counsel's	15:9 33:24 34:10 counting 23:18 couple 20:21 23:5 26:22 course 12:11 13:6 16:18 court 19:25 31:24 32:19 cover 15:21 crack 17:24 crafted 17:14 create 13:25 creation 13:3 CSR 35:23 CUP 25:12 current 23:12 CURRY 3:9 cut 19:19 D Daigle 3:11 17:9 34:15 34:16 darkness 15:22 data 21:3 date 25:24 35:17 Dated 35:20 Dave 3:12 14:10 David 3:11 4:15 day 10:9,18 10:24 de 4:25 deal 32:7 dealing 5:1 decide 7:9 18:8 29:8 29:11,14 29:19 30:15	32:10 decided 4:22 decides 22:7 decision 5:10 6:1 10:2,6 11:8 18:9 21:1 22:11 22:12,13 22:14,22 29:3 31:14 31:21 34:12 decisions 17:22 defensible 31:15 32:4 definitely 17:4 19:17 20:5,12 demonstrate 28:4 demonstr... 26:6 27:15 27:23 denial 4:10 12:1 denied 4:22 Denise 27:17 deny 22:8,15 22:24 denying 29:1 Denys 23:3 27:6 depending 22:6 23:17 description 15:9 detail 18:21 21:10 detailed 14:13 determin... 5:4 6:3,19 9:10 10:4 10:12,14 13:22,25 29:16 30:2	30:25 determin... 18:20 30:16 determine 30:9,17 determined 6:6 determines 12:18 determining 6:10 detrimental 9:20 Dick 19:14 19:15 different 15:10 17:21 20:21 22:1 27:19 direct 13:25 30:25 direction 35:12 directly 15:12 29:18 disabled 13:3 28:22 disagree 17:12 18:17 32:7 discount 28:11 discrimi... 20:9 discrimi... 11:7 13:13 discusses 31:8 discussion 33:4 34:14 disregard 32:18,18 32:20 disruptive 10:23 11:9	distance 12:23 distances 10:3 distributed 32:17 document 14:19 documented 25:6 DON 3:10 draft 12:25 drafted 9:18 22:13 dramatic 21:14 dryer 30:10 due 10:19 19:18 34:6 D.C 3:18 E EDWARD 3:8 effect 13:8 elementary 10:21 employee 35:15 endangering 15:22 enforce 20:14 engage 10:23 11:8 entered 23:6 31:1 entire 33:14 entirely 5:6 18:23 entity 9:8 29:12,15 erase 31:22 erased 32:1 ESQ 3:4,5 essentially 9:6 establish 10:3
---	---	--	---	--

evening 8:8 22:18 23:3	expressing 21:8	far 21:1,1,2	forward 4:23 6:4 7:15	28:11 31:21
event 24:10	eye 32:16	fascinating 10:1	8:6 18:9	gobbledy... 6:12
everybody 17:1 31:20	e-mail 5:16	feel 6:16 27:2,5,7	19:11	goes 11:4 19:20
evidence 5:1	F	feet 9:23,23	28:17	going 4:6 11:5 14:25
5:4,9,20	F 3:8	12:21,22	29:24 30:7	15:5 26:20
5:23 6:4,8	face 13:8	15:18	31:8,21	28:3,4,5
6:9,11,14	facilities 9:22,24	23:17	32:18	28:10,10
7:7,10,11	10:9,10,17	24:18	fought 19:24	31:11,25
9:1,7,14	10:18	felt 22:22	four 24:17	good 8:8 21:22
10:2,7,7	12:19,20	final 21:25	frankly 20:24	22:18 23:3
11:2,25	23:18	financially 35:14	front 17:6	Good-bye 31:4
13:10,14	24:17,18	find 14:20	Fry's 9:24	Grand 3:5
13:15,23	24:19	25:5	full 23:10	granted 8:16 8:17
14:17,22	facility 8:19 9:20	finding 5:5 9:15 10:15	function 31:13	great 21:9 32:9
15:9 16:10	20:12 21:6	12:15,21	functioning 21:21	green 19:8
16:13,15	21:11,23	28:25	fundamental 30:18	ground 22:8 28:24
16:17,18	23:21,23	33:12	Fundenberg 22:18,19	30:15
16:22 17:2	23:25 24:5	findings 6:20,21	further 13:21	group 4:20 19:23
17:5,16	24:7,7,14	9:15,19	14:22	24:23
18:3,10,13	24:15,15	13:4,14	17:16	guess 24:2
20:22 21:5	24:16	30:22	34:14	guy 15:18 16:4 17:23
21:21 22:3	25:19	fire 15:15	35:12,14	
23:11 25:7	26:23,25	15:19	F-u-n-d-... 22:19	
27:23 28:7	27:1	firm 22:11	G	H
29:3,12,15	fact 10:6 12:17,22	first 4:7 9:19 15:8	G 3:16	half 26:12
30:21	16:8 21:17	15:11 17:4	GARDNER 3:10	handful 11:12
31:17 32:4	23:10 26:6	17:24 18:7	gather 29:15	hands 31:18
32:6,16,23	28:11	18:13	general 25:2	happen 11:3 18:4
33:3,16,18	32:13	21:18	generally 24:24	happened 18:4 29:24
33:25 34:1	facts 23:9 28:23	23:12 25:8	genuine 29:25	31:17
34:2,3,12	30:15	32:14 33:6	germane 17:7 17:7	happens 12:20
evidentiary 20:23	factual 27:23	five 29:23	GERSHON 3:4	16:16
22:11	factually 23:16	Floor 3:5	give 14:7	31:23
example 29:9	failed 25:11	focus 5:7,8 21:15	given 32:6	harshly 21:2
excuses 25:25	failure 26:1	followed 22:23	go 6:21 7:12 9:9 18:9	
exerts 11:13	fairest 17:25	foregoing 35:6,8,12	26:19	
exist 23:18	fairly 14:13	former 21:9		
existing 23:22,25	falls 28:4	forth 8:13		
24:6	family 15:22 20:10	20:13 35:7		
exists 22:14				
expansion 15:14				
explain 32:6				

hazard 15:15	5:18	incompat...	28:9,10,12	24:19
hear 17:11	home 15:12	10:24	33:15,17	27:13,25
heard 24:9	26:24	independ...	33:18	
33:25	29:24	17:17	34:11	L
hearing 2:7	homeowners	independent	issued 10:12	lady 26:17
4:4,7,8,8	27:8	17:15 18:5	issues 5:11	land 18:18
4:9,20,22	homes 4:20	individual	5:25 6:6	18:19,22
4:25 5:1,2	15:17	11:17,20	7:2,4,8	24:22,25
5:5,10,21	19:22,23	12:2	13:16 17:8	language
5:24 6:1,5	20:7,8	individuals	21:11,25	11:1
6:7,8,10	28:22	11:7,14,24	29:8,20	large 24:15
6:16,16,18	hope 22:23	12:5,11	item 4:6,6	24:17
6:21 7:4,9	Horizons	13:16	items 23:6	larger 20:7
7:12 8:12	12:21	28:22 30:7		Larry 20:19
8:15,18,24	21:16,20	indulgence	J	Laura 2:11
9:3,5,12	23:20	8:1	Janet 3:12	35:22
9:16,18	housing 12:1	infraction	14:11	law 3:17
10:1,13	huge 21:2	11:24 12:3	Jim 3:4 4:16	24:20
11:14 12:6	Hunt 3:11	12:3,7	job 5:2	lawyer 31:24
12:15,18	4:14,15	29:25	15:21	learned 15:8
13:5,12,21	7:19 33:15	infractions	judge 32:8	left 19:10
13:24		12:10	judicious	legal 6:12
14:12,16	I	29:22	26:5	legality
14:21	identify	initial 4:16	justified	13:7
16:16,25	11:12	instance	12:1	legally
17:6,10,14	illegal	18:13	justify 12:2	31:15
17:16,20	25:18	institut...	29:1	Legion 9:25
18:5,12,15	immediately	13:4		LEILANI 3:13
18:18	26:9	integral	K	LESLIE 3:11
20:25 21:4	impact 9:20	19:18	K 3:5	let's 13:18
22:10,22	10:4,8,16	interest	keep 16:1	level 6:10
25:7 26:12	12:23	34:8	KEITH 3:9	license
29:3,10,10	13:16	interested	Kiff 3:12	25:13
29:13,13	impacts 26:8	35:15	11:11 14:8	licensed
29:22	29:18	introduc...	14:10 15:5	9:24 10:10
30:23,25	important	7:14	19:4	22:2 24:7
31:6 32:5	12:10 29:1	investig...	Kit 15:1,3	licensing
32:8,22	29:5,17	9:9	knew 20:3	9:10 18:16
33:2,11,21	importantly	invite 28:17	25:15	18:23
33:25 34:3	9:3 12:25	issue 5:9,19	know 15:16	licensure
34:11	18:11	5:20 7:6	15:19 27:6	9:8 21:25
hearings	impression	7:11,16	27:6,6	22:7
27:19	33:7	8:25 9:1,4	28:12	life 11:24
Hello 20:19	inapprop...	9:13 16:12	30:10,12	12:3,6,10
Henn 3:8	18:15	17:5 18:16	32:18,19	28:9,10
33:4,5	include	18:17,18	knowledge	29:20,21
34:5	24:14	18:22	14:21	light 19:9
highlighted	32:10	21:14,17	known 23:18	lights 19:9
			24:15,18	

limit 8:20 14:2	Mathena 20:19,19	28:18	28:5	occur 29:22
limited 19:7 34:2	matter 4:18 4:21 15:18	mistake 15:13	neither 35:14	occurred 12:7 15:14
listed 26:2	32:14,22	mitigating 24:21	never 12:8 30:13	occurring 12:9 13:17 30:19
Listen 15:25	matters 5:12	model 20:9	new 13:25	Ocean 4:24 23:23 24:5
listing 24:13	Mayor 3:8 4:14 7:19	modeled 14:1	newly 16:13 16:14,17	offensive 10:23 11:9
little 19:8 32:10	8:10 14:8 28:20	money 16:5	Newport 1:7 1:8,9 2:7	Officer 4:22 5:5,10,25 6:7,8,17 6:18,22 7:10,13 8:13,18,24 9:3,5,12 9:16,18 11:14 12:6 12:16,18 13:5,12,21 14:17 16:16,25 17:7,10,15 17:20 18:5 18:12,15 18:18 21:4 22:10 25:7 29:10,10 29:13,14 29:23 30:23 32:5 32:8,22 33:2 34:3 34:11
live 8:22 26:21	ma'am 26:19	months 12:6 29:23	2:8,8,9 3:3,7,13 3:14,15 4:1,11,21 6:24 8:9 8:21 10:20 10:22 11:15 12:20 14:12 22:20 30:1	
lives 13:16 27:4	mean 29:20	motion 32:22 33:4,5 34:13,18		
living 19:23 28:22	means 5:23 11:24	move 4:6 32:18 34:9	Nichols 19:14,14 19:16	
LLC 1:8 3:15	meeting 1:7 26:18	multiple 19:23	noise 11:20	
location 11:22 21:16	member 3:8,9 3:9,10,10 3:11 8:3 14:24 30:6	music 11:21 30:12	noising 11:21	
loiter 10:23 11:8	members 8:10 10:11 11:1 11:11 14:5 14:9 28:20	Mustafa 27:12	normally 5:25	
long 26:18		M-a-t-h-... 20:20	novo 4:25	
longer 5:17		N	number 4:7 11:12	
look 5:24 9:17 17:15 18:1,2,13 29:14	memo 5:18 14:16	name 8:6,8 22:19 23:3 26:21 35:18	numerous 21:24 28:6	
Los 3:6	memos 32:16		NW 3:17	
losing 16:5	mention 32:10	NANCY 3:10		officers 30:17
lot 11:24	mentioned 5:22 34:4	narrow 32:23 32:25 34:11	oath 35:9	Officer's 4:10 6:1 6:10 8:15 10:1,13 13:25 17:16 20:25 22:22 29:3 30:25 33:11,22 Oh 21:18
loud 30:13	mere 21:3	nature 32:2		
Louise 22:19	meticulo... 17:14	nearby 10:24		
lyrics 30:13	MICHAEL 3:8	need 7:11 17:15 20:14 26:4		
M	mile 9:23	needs 24:25	O	
machine 35:10	Millsap 2:11 35:22	neighbor... 9:21 10:16 19:21 20:13 27:5 28:3	oath 35:9 Oberman 23:3 23:4 25:10	
making 4:15 6:2 17:21 34:8	mind 31:22 32:1,13	neighbor... 13:4	obligation 31:12	
Manager 3:12 14:10	minimize 11:16 29:20	neighbors 15:11,25 16:10 26:8	observing 34:6	
Market 9:24	minute 19:9		obtain 25:11	
Markman 3:4 4:16 31:10 33:20	minutes 7:3 7:3,20,23 8:1,3 19:7 19:15		obvious 20:6	
materials 30:8			occasions 11:17 28:6	

okay 4:4	29:24	22:24	13:18 18:2	problems
7:17,25	overconc...	23:21,24	30:2,17	16:3 21:7
14:24 15:2	12:16,19	24:7 26:12	POLIN 3:16	21:10,22
19:2,5,12	20:6 21:13	29:1	poor 30:13	procedure
26:16 31:5	21:14,19	permits	position	17:13,23
33:1 34:14	23:13,14	15:20	16:14,14	proceed
34:19	24:21,25	25:12,12	potential	17:25
ongoing	27:3,15,16	pernicious	10:22	proceeding
21:24	27:21	12:15	23:14	5:14 13:21
open 7:4	28:21	person 11:21	potentially	34:7
10:20 19:5		13:22	22:4	proceedings
26:9,25	P	17:10 29:8	precisely	35:6,8,10
operate	page 10:13	29:11,19	21:2	process
25:18 26:6	parents 21:7	personal	preliminary	30:19
operated	part 9:2	25:14	5:12,20	31:13 32:4
8:19 25:21	14:19	personally	7:6	34:6
operation	24:22	22:12	prepared	proof 7:24
9:20 19:17	particip...	26:11	26:5	28:4
19:18	34:7	pertinent	present 18:3	proper 12:11
operator	particular	32:24	30:8	16:15
21:22	13:14	petition	presenta...	29:16
opine 29:13	16:11	21:8	4:13,16	proposed
opinion 18:5	30:22	petitioners	6:25 14:7	8:18
18:6	parties	21:7	14:25 19:3	provide 7:2
opportunity	35:16	piece 32:4,6	presented	7:3 14:12
18:1 32:6	passed 15:6	32:15	8:23 9:6	provided
opposed	passive	place 19:24	10:7 11:10	11:13
21:23 28:5	29:20	32:14 35:7	13:11 22:3	13:15 21:8
opposing	passive-...	placed 35:9	22:4 23:11	proximate
16:24	28:8	Planner 3:12	32:4 33:22	10:3
17:17 18:1	path 15:5	playground	34:3	proximity
option 6:7	patience	26:10	President	9:22 10:9
6:17 7:18	31:4	please 8:6,7	22:20	28:23
Ordinance	PATRICK 3:5	19:11	prevents	public 4:4,7
4:17 11:6	pending 5:14	26:17	24:20	4:8 5:8
13:1,8	23:23 24:3	34:17	previously	7:4,18,21
Ordinances	Peninsula	pleased 24:8	25:12	8:1,2,3,4
26:1	15:17	plus 27:3	prior 35:6,8	14:12,14
organiza...	24:10	podium 19:8	probably	19:6,7
22:24	people 19:23	point 15:10	18:21	31:6 32:16
original	20:8 21:23	19:5 21:25	problem 11:4	pulled 15:20
14:2 31:2	22:21 24:9	22:2 29:1	12:13,13	purely 20:22
originally	26:11 27:6	29:5	13:19,19	purpose 9:4
8:18	29:23	points 15:7	20:3 30:3	13:2 32:23
oust 20:15	30:15	20:21	30:4,10,17	purposes
outlined	period 8:4	28:13	30:19	13:1
8:11	permit 4:10	police 12:4	problematic	put 11:19
outside	4:20,22	12:12	21:6	30:10
	8:16 22:8			

p.m 2:10,10 4:2,2 34:20	recommen... 7:1 8:17 8:22 14:2 31:2 33:2 34:10	25:13 regular 16:18 reiterate 15:3	represent 8:9 22:21 represen... 8:5 represen... 28:2 represented 6:5 24:4 request 5:13 5:14,17,17 23:6 requesting 7:15 required 25:12 residence 26:9 residential 12:19 19:21,24 20:12 24:24 25:14,17 25:18	right 12:4 17:10 robust 23:10 ROSANSKY 3:9 34:13 RPR 2:11 35:22
Q quality 11:23 12:3 12:6,10 28:9,9 29:19,21 quarter 9:23 question 9:7 15:8 16:8 20:1 27:1 31:11 33:6 questions 18:24 quick 15:6 23:5 quote 10:18 11:8	recommended 17:20 record 5:3,6 5:24 8:6 8:12 9:2 9:14 13:11 14:18,21 15:9 18:10 20:23 21:21 22:12,14 23:7 27:13 28:14 32:15 33:8 33:14,16 33:20,21 33:23 35:10	related 33:17 relative 21:25 24:23 35:15 relevant 6:6 6:15 10:4 32:9,9 33:24 relocated 24:9 remains 8:22 remand 6:7 6:17 7:9 13:20 16:16,25 18:12 30:23 31:11 32:5 32:25 33:2	required 25:12 residence 26:9 residential 12:19 19:21,24 20:12 24:24 25:14,17 25:18 residents 10:19,22 25:3 Resolution 8:15 9:17 14:1,1 32:11 34:4 respect 4:17 4:19 5:12 response 17:9 18:14 32:24 responsi... 30:5 responsible 30:6 retread 15:5 review 5:3 10:13 13:10 14:14 33:3 reviewed 31:24 RICHARDS 3:4	S S 3:5 Sarah 26:21 satisfac... 20:15 saying 28:8 says 10:17 scheduled 4:5 scheme 24:23 school 9:22 10:9,18,21 10:24 20:2 21:8,9,11 26:10 second 4:19 5:19 16:12 27:24 29:5 29:17 34:13 Secondly 18:11 25:2 seconds 25:8 25:9 see 30:1 Seeing 19:12 28:17 SELICH 3:8 4:4 7:17 7:25 14:6 14:24 18:14,24 19:1,5,12 19:15 20:17 22:17 23:1 25:9 26:15 27:11 28:16 31:5 33:1 34:14 34:17,19
R raise 22:1 raised 5:11 21:17,22 raises 21:12 reach 7:11 reached 9:15 read 29:2 reality 21:20 really 28:9 reason 23:9 32:21 reasonable 5:14 reasonably 6:5,15 rebut 7:18 32:7 rebuttal 32:24 recall 5:22 recap 31:16 received 5:16 25:22 recommend 8:15 31:12	recovery 1:8 3:15 4:11 4:21,25 6:24 8:10 8:21 10:20 10:22 11:8 11:15 12:20 14:12 23:23 24:5 30:1 recreati... 10:20 red 19:8 redraft 31:1 reference 25:2 referring 10:17 regard 16:12 regarding 4:20 registered 25:16 registra...	relocated 24:9 remains 8:22 remand 6:7 6:17 7:9 13:20 16:16,25 18:12 30:23 31:11 32:5 32:25 33:2 remanded 34:10 remanding 9:5 32:22 remember 19:6 render 18:5 rendered 31:14 repeated 21:24 report 11:10 14:13,23 23:8,13 24:8 25:2 25:6 26:3 Reporter 2:12 35:5 reports 18:2 24:9	represent 8:9 22:21 represen... 8:5 represen... 28:2 represented 6:5 24:4 request 5:13 5:14,17,17 23:6 requesting 7:15 required 25:12 residence 26:9 residential 12:19 19:21,24 20:12 24:24 25:14,17 25:18 residents 10:19,22 25:3 Resolution 8:15 9:17 14:1,1 32:11 34:4 respect 4:17 4:19 5:12 response 17:9 18:14 32:24 responsi... 30:5 responsible 30:6 retread 15:5 review 5:3 10:13 13:10 14:14 33:3 reviewed 31:24 RICHARDS 3:4	right 12:4 17:10 robust 23:10 ROSANSKY 3:9 34:13 RPR 2:11 35:22

separate 18:23	Soylemmez 27:12,12	state 8:6 24:7 35:5	suggest 7:14 32:3	18:25 19:1 19:16
separation 15:16	so-called 9:1	stated 13:1 13:2 24:4	suggested 23:14	20:16,17 22:16,17
seriously 28:13	speak 19:10 26:16,20	33:11	suggestion 7:20 33:9	22:25 23:1 25:10
served 9:5 14:11	speaker 20:18	states 10:14 10:15	summarize 14:15 25:4	26:14,15 27:10,11
service 25:14	speakers 23:2 26:15	status 24:2	summary 23:8	28:15,16
set 4:8 8:13 17:13,22	28:16	stay 5:13,18	supervision 25:22	28:19 31:3 31:4
18:19 35:7	special 4:16 15:3 34:9	Ste 3:17	support 9:14 13:14	thereof 35:13
shared 31:18 31:19	specific 16:2,10	sterotypes 11:7 13:13	22:12,14	thing 16:2,2 22:5 26:4
shorthand 2:11 35:4	21:17 28:7	STEVEN 3:9 3:16	30:22	29:17
35:11	specific... 20:24 21:5	story 18:3	supported 5:10 6:11	things 15:10 18:7 22:1
side 19:6,10	23:15	street 3:17 23:15	supports 5:5	25:5 30:14
sides 32:17	24:24 25:5	24:15	sure 6:13 31:13 34:8	think 6:14 9:17 12:15
significant 11:23	27:19	25:19	system 12:5	15:23 16:4 18:20 26:4
13:16	specifics 21:15	strenuously 16:21	T	27:25 28:3 29:17
simple 6:13 12:22	speculation 11:2,4,6	strongly 16:8 22:22	take 9:17 28:11	30:19 31:16
simply 15:8 16:25	13:12	structure 29:7	taken 2:7 35:6	thoughts 31:7
sir 19:4	staff 4:12 4:12 6:25	subject 23:2 24:1	talk 28:20	three 9:22 19:15
situation 15:24	7:3,21,22	submitted 6:15	talked 4:24 4:24	24:17 28:18
size 19:18	8:11,16,18	subscribed 35:17	talking 20:7	29:23
smell 11:22	8:23 11:10	substandard 15:20	tell 28:2	time 4:5,9 6:16 12:12
smoke 10:23 11:8,22	11:10,11	substantial 5:1,4,23	tenant 16:1	13:17 14:4 19:13
sole 12:17	13:25 14:7	6:11 7:7	tenants 15:25 16:5	34:20 35:7
solution 13:17	14:11,13	7:11 9:14	terms 21:15 29:6	times 15:17 27:18
somebody 24:11	14:16,24	11:1,25	testify 5:8 30:7,8	titled 32:9 today 8:14
something's 22:2	16:7,21	13:10,13	testifying 35:9	27:1
soon 26:25 29:6	17:6,19,20	14:17,22	testimony 7:5,18,21	tonight 8:25 10:13 13:9
sort 31:16	19:2 23:8	18:10	11:13 23:9	16:23,25 18:6 26:18
sounds 6:12	23:13 25:6	20:22 21:7	23:11	
source 12:13 13:19 30:3	26:2 30:25	21:14,21	26:13	
30:18	31:2,7,18	22:11	thank 4:14 8:10 14:4	
	33:1	30:21	14:5,6,8	
	staff's 8:17 14:1 16:14	33:16		
	stand 19:12			
	standard 4:24 5:23			
	8:13 13:10			

29:2,9	unit 20:15	week 31:17	years 25:20	3
30:20	unspecified	weeks 26:22	yellow 19:8	37:23 8:1,2
33:24	25:24	weighs 17:5	19:9	19:7
total 24:17	untested	weight 20:22	Z	30 20:8 25:8
totality	12:7	32:9,10	zoning 20:13	25:9
33:8	use 4:10,20	went 21:9		300 9:22
transcribed	6:19 8:16	weren't 23:9	1	12:21,22
35:11	10:19	West 4:10	119:9	23:17
transcript	18:18,19	23:20,22	10 7:2,3,20	24:18
33:22	18:22 22:8	23:25 24:4	10:13	310 3:17
transcri...	22:24	24:6,14	11th 23:15	330 23:17
35:13	23:21,23	25:19,23	11-bed 23:21	3300 2:8
trash 11:19	24:22,25	26:21,25	1100 27:3	3:13
11:19	26:12	27:2	1115 23:22	331-5848
treatment	uses 24:24	we'll 7:5	1129 24:6	3:18
25:23		14:6	1132 23:20	355 3:5
tried 29:2	V	we're 4:6	12th 23:15	4
try 6:13	vacate 8:14	10:12 11:5	12-bed 24:6	40 21:7
Tuesday 1:10	13:24	11:5 28:10	1216 4:10	40th 3:5
2:10 4:1	30:24	28:10,11	23:25	407 27:12
turn 4:12	vacated 24:8	28:21	24:16	5
10:11	valid 31:15	we've 17:13	25:23	500 22:21
12:14	vans 11:18	17:22	1217 24:4	6
two 5:11	various 26:1	19:21 29:2	26:25 27:1	6 20:8
9:15,19,24	29:8	whatnot	1219 25:19	6-bed 24:5
11:17 15:6	verbatim	27:20	14 1:10 2:10	600-page
15:10 18:7	35:9	whatsoever	4:1 19:20	20:23
22:1 27:3	video 21:5	12:22	20:8	626-8484 3:6
28:13	vote 34:17	WHEREOF	14-bed 8:19	644-3002
29:23		35:17	14:2	3:14
type 11:3	W	willing 8:22	1601 24:14	7
20:15	walks 11:22	wiring 15:19	1712 3:17	7:15 4:5,9
21:10	want 11:16	30:9,10		7:25 2:9 4:2
types 9:22	12:14 13:9	wish 6:22	2	7:45 2:10
	14:4,15	withdrawing	20 4:7 20:8	4:2
U	27:13 31:3	5:17	20.91A.040	750 9:23
ultimately	32:7 33:20	WITNESS	8:13	8
7:7 22:14	wanted 23:5	35:17	20006 3:18	8:05 34:20
undersigned	25:4	witnesses	2008-05 13:1	83 26:11
35:4	wants 17:19	35:8	2009 1:10	9
understand	19:10	won 19:25	2:11 4:1	9th 24:15
26:24	26:16	word 28:20	2009-001	26:23
27:22	Washington	worried	8:15	
understa...	3:18	15:14	202 3:18	
24:22	wasn't 26:20	worse 11:3	213 3:6	
understands	WATSON 3:4	written 21:2	22-bed 23:23	
31:20	way 17:22,25		29-beds 24:1	
unfortun...	23:16	Y		
8:23	WEBB 3:10			

90071-3101

3:6

90826:21**92658-8915**

3:14

92662:12

35:23

9493:14

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